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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 631

SALAMONIE PACKING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 316–319) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 6, 1948 (R. 319). The petition for a writ of certiorari was filed February 27, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an article of food which is proceeded against under Section 402 (a) (3) of the Federal

Food, Drug, or Cosmetic Act on the ground that it consists in whole or in part of a filthy, putrid, or decomposed substance, must be proved to be unfit for food to warrant the entry of a decree of condemnation under Section 304 (a) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301 et seq., are as follows:

> SEC. 304 (a) [21 U. S. C. 334 (a)].—Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of section 404 or 505, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *
>
> SEC. 402 [21 U. S. C. 342].—A food shall be deemed to be adulterated
>
> (a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *.

STATEMENT

Pursuant to Section 304 (a) of the Federal Food, Drug, and Cosmetic Act, the United States

filed five libels of information in various district courts for the seizure and condemnation of quantities of tomato juice which had been shipped in interstate commerce. The libels charged that the product was adulterated under Section 402 (a) (3) in that it consisted, in whole or in part, of a decomposed substance by reason of the presence therein of decomposed tomato material. (R. 2–12.) The cases were consolidated for trial in the District Court for the Eastern District of Missouri, pursuant to Section 304 (b) of the Act, 21 U. S. C. 334 (b) (see R. 30–31). Petitioner, as claimant, denied in its answer (R. 16–17) that the tomato juice was adulterated and averred that it "was neither harmful nor poisonous, but good and safe for human consumption" (R. 16). On motion of the Government, the court struck the quoted portion of the answer on the ground that it did not constitute a defense (R. 21, 25–26). At the trial before a jury, the Government proved that the tomato juice contained mold and decomposed tomato material; that both the mold count method and the rot fragment method of examination revealed the presence of rotten tomato tissue in the juice (R. 83–87, 91, 96–99, 116–121, 129–132, 133–148, 151–162). At the close of the Government's case and again at the conclusion of the evidence, petitioner moved for a directed verdict on the ground, *inter alia*, that there was no evidence that the product was unfit for food; the motions were denied (R. 163, 165, 277–278). The

jury returned a verdict for the Government (R. 307–308), and a decree of condemnation was entered by the district court (R. 308).

On appeal, the judgment of the district court was affirmed (R. 319). The circuit court of appeals held, following *United States* v. *1851 Cartons, etc.*, 146 F. 2d 760 (C. C. A. 10), that "the statute means that food which contains filthy, putrid, or decomposed matter is to be deemed adulterated, whether or not it is fit for food" (R. 318). The court accordingly concluded that the district court did not err "in ruling that the question whether the tomato juice was fit for food was not and could not be made an issue in the case" (R. 319).

ARGUMENT

1. Section 402 (a) (3) of the Act declares that a food shall be deemed to be adulterated "if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food." It is the position of the Government that where an article of food is proceeded against on the ground that it consists in whole or in part of a decomposed substance, a decree of condemnation must be entered if it is found as a fact that the food contains decomposed matter, without regard to whether it is unfit for food or injurious to health. This view is consistent with the design of the statute to secure the purity of foods and drugs. *United States* v. *Antikamnia Chemi-*

cal Co., 231 U. S. 654; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45.

It appears to be the position of the petitioner, however, that the clause, "or if it is otherwise unfit for food," qualifies the preceding clause, with the result that unfitness for food, as well as filth, putridity or decomposition, must be shown before a food may be condemned as adulterated. But this construction cannot be sustained. The whole subject of this subdivision of the statute is modified by two dependent clauses, and the second "if," following the disjunctive particle "or," plainly indicates that the second clause is coordinate and independent rather than a qualification of the antecedent clause. The first clause clearly bans all products consisting in whole or in part of any filthy, putrid, or decomposed substance, and the second clause goes on to add to the ban articles which are unfit for food *for any other reason.*

There are other subdivisions of Section 402 (a) which specify as characteristics of banned foods that they be "deleterious," "injurious to health," "the product of a diseased animal," etc. These specified characteristics thus become essential prerequisites to be proved in cases brought under those subdivisions. But in the first clause of subdivision (3), the sweeping ban of foods consisting in whole or in part of any filthy, putrid, or decomposed substance reveals a congressional determination that the presence of filth, putrid-

ity, or decomposition in a food product is itself sufficient to justify the exclusion of the product from the channels of interstate commerce. That being so, it is no part of the Government's case to establish that a product, which is proceeded against under Section 402 (a) (3) on the ground that it consists in whole or in part of a filthy, putrid, or decomposed substance, is by reason thereof unfit for food or is deleterious to health. This has been the consistent interpretation of the subdivision in the lower courts. *United States* v. *1851 Cartons, etc.*, 146 F. 2d 760, 761 (C. C. A. 10); *United States* v. *935 Cases * * * Tomato Puree*, 65 F. Supp. 503 (N. D. Ohio); *United States* v. *Lazere*, 56 F. Supp. 730, 732 (N. D. Iowa); *United States* v. *184 Barrels Dried Whole Eggs*, 53 F. Supp. 652, 655–656 (E. D. Wis.).

The history of this part of the statute likewise supports our construction. Section 7, Sixth, of the predecessor Food and Drugs Act of 1906, 34 Stat. 769, 21 U. S. C. (1934 ed.) 8, declared that an article of food should be deemed to be adulterated if it consisted "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance * * *." Under the 1906 statute, the courts uniformly held that a food containing a decomposed substance was subject to condemnation even though it was otherwise considered as fit for human consumption or not deleterious to health. *United States* v. *Two Hundred Cases, More or*

Less, of Canned Salmon, 289 Fed. 157, 158 (S. D. Tex.); *Knapp et al.* v. *Callaway,* 52 F. 2d 476, 477 (S. D. N. Y.); *United States* v. *Two Hundred Cases of Adulterated Tomato Catsup,* 211 Fed. 780, 782–783 (D. Ore.); *United States* v. *462 Boxes of Oranges,* 249 Fed. 505 (D. Colo.); *United States* v. *133 Cases of Tomato Paste,* 22 F. Supp. 515, 516 (E. D. Pa.). The first clause of Section 402 (a) (3) of the present act follows closely the corresponding provision of the earlier statute, and it is obvious that Congress intended that the provision should have the same meaning in the new law.[1] The plain inference to be drawn from this history is that the second clause of Section 402 (a) (3) was added to reach foods which are unfit for human consumption for reasons other than that they contain filthy, putrid or decomposed substances. This, we submit, is the meaning of the word "otherwise" in the second clause, upon which petitioner's contention rests. And this construction of subdivision (3) comports with and furthers the express congressional intention to preserve in the present law the best features of the 1906 Act and at the same time to "strengthen and extend that law's protection of the consumer." S. Rep. No. 152, 75th Cong.,

[1] See S. Rep. No. 361, 74th Cong., 1st sess., p. 7:

"The provisions of section 301 (a) (3) and (5) [which subsequently were incorporated into Section 402 (a)] dealing with filthy food and food from diseased animals, are essentially the same as those of the present law."

1st sess., p. 1; see also H. Rep. No. 2139, 75th Cong., 3d sess., p. 1; *United States* v. *Dotterweich*, 320 U. S. 277, 280, 282. As the Tenth Circuit said in *United States* v. *1851 Cartons, etc.*, 146 F. 2d at 761, in rejecting the construction urged by petitioner here:

> Notwithstanding this strict construction of the language employed [2] of which Congress was undoubtedly aware, the amendment of 1938, Sec. 402, not only impliedly approved this construction of its language but strengthened it by adding words which leave no doubt of its intention to free interstate commerce of any food if it consists "in whole or in part of any filthy, putrid, or decomposed substance." The added clause "or if it is otherwise unfit for food" is in the disjunctive and does not condition, qualify, or obscure the plain meaning of the whole sentence when considered in its context. * * * This view is supported by the general purpose of the amendment to extend the range of control over impure and adulterated food and drugs moving in interstate commerce. *United States* v. *Dotterweich*, 320 U. S. 277, * * *.

Petitioner argues, however, that the decision below "militates against every consideration of reason and common sense, in that it construes a federal statute in such a way as would authorize the condemnation and destruction of many essen-

[2] The reference is to the decisions under the 1906 Act (see pp. 6–7, *supra*).

tial, wholesome and desirable articles of food," citing cheese as an example (Pet. 12–13). But it seems clear that the statutory language must be construed reasonably in the light of its obvious purposes; and that Congress intended that the words "filthy," "putrid," and "decomposed," as used in the Act, must be given their usual and ordinary meaning and not their technical, scientific, or medical definitions. There was clearly no purpose to ban foods which, though in a technical sense may be said to be decomposed in part, are commonly accepted as wholesome. See *United States* v. *Swift & Co., et al.*, 53 F. Supp. 1018, 1020 (M. D. Ga.); *United States* v. *Commercial Creamery Co.*, 43 F. Supp. 714, 715–716 (E. D. Wash.); *A. O. Andersen & Co.* v. *United States*, 284 Fed. 542 (C. C. A. 9), cited *infra*.

2. There is no conflict in the applicable decisions. Petitioner relies (Pet. 9–10) on *A. O. Andersen & Co.* v. *United States*, 284 Fed. 542 (C. C .A. 9), decided under the Food and Drugs Act of 1906. But the opinion is in no wise inconsistent with the opinion of the circuit court of appeals in the instant case. In answer to the specific contention that food proceeded against because of decomposition must be proved to be injurious to health, the court in the *Andersen* case declared (p. 544):

> That case [*United States* v. *Two Hundred Cases of Adulterated Tomato Catsup*, 211 Fed. 780 (D. Ore.)] answers the

> further contention on the part of the defendant in error that adulterated salmon is not injurious to health or dangerous to life:
>
> "It was also urged that, since there is no proof that the product in question would be injurious to health, a verdict should be ordered in favor of the claimant; but I do not understand that such proof is necessary or required under the provisions of the Food and Drugs Act, on which this proceeding is based."

Thus, the *Andersen* case is consistent with the uniform decisions under the 1906 Act. Furthermore, the court in that case rejected a contention, similar to that advanced by petitioner (Pet. 12), that the Government's construction would cause the destruction of many "desirable" articles of food, stating (p. 544):

> The defendant in error seeks to uphold the judgment on other grounds. First, it is urged that decomposition sets in immediately after the death of animals or fish; that a literal construction of the act would exclude from interstate commerce all canned fish and meat products; that for this reason the court must hold that Congress intended to prohibit the introduction into interstate commerce of products containing an unreasonable amount or quantity of decomposed matter only; and that the statute as thus construed is void for uncertainty, * * *. This argument is more specious than sound.

> Decomposition may begin where life ends, but meat or fish is not decomposed at that early stage. Decomposed means more than the beginning of decomposition; it means a state of decomposition, and the statute must be given a reasonable construction to carry out and effect the legislative policy or intent.

Van Camp Sea Food Co., Inc. v. *United States,* 82 F. 2d 365 (C. C. A. 3), also cited by petitioner as being in conflict with the decision below (Pet. 10), is not in point. The holding of the case, which also arose under the 1906 Act, was merely that the court below had erred in charging the jury that the burden was on the Government to prove its case by "the fair preponderance of the evidence" and "the fair weight of the evidence." The circuit court of appeals declared that the Government's burden was to establish its case by "clear and satisfactory evidence." The rest of the opinion appears to be dictum, but a careful reading clearly reveals that all the court adverted to, in addition to the nature of the burden of proof, was with respect to the fact that the Government had not proved that the product proceeded against was in fact decomposed as charged. But that fact was established in the present case by the verdict of the jury.

The decision of this Court in *Sligh* v. *Kirkwood,* 237 U. S. 52, upon which petitioner relies (Pet. 11–12), involved the validity, under the

commerce clause, of a Florida statute prohibiting the sale or shipment of citrus fruits which were immature or otherwise unfit for consumption. The defendant was convicted of having shipped from Florida to Alabama oranges which were immature and unfit for consumption. Upon petition for a writ of habeas corpus, the court refused to order the release of the defendant, and the judgment was affirmed upon writ of error to the Supreme Court of Florida (65 Fla. 123).

The Supreme Court of Florida held that the statute dealt with "the field of deleterious immaturity of fruit" and prohibited "immature citrus fruits produced within her [Florida] borders from becoming the subjects of shipment or sale," and was not in conflict with the Food and Drugs Act of 1906. This Court, in affirming the judgment of the Supreme Court of Florida, stated (p. 57):

> The single question is: Was it within the authority of the State of Florida to make it a criminal offense to deliver for shipment in interstate commerce citrus fruits,—oranges in this case,—then and there immature and unfit for consumption?

This Court did not interpret, or have before it the problem of the interpretation of, the Florida statute. The Supreme Court of Florida had already interpreted the law and the only question before this Court was whether the statute, as

interpreted by the Supreme Court of Florida, was in violation of the Federal Constitution. This Court refused to consider whether the statute might be constitutional if applied to shipments of citrus fruits for commercial purposes such as for making wine and citric acid, since (p. 62) "the constitutional objection must be considered in view of the case made before the court, which was a delivery for shipment of oranges so immature as to be unfit for consumption." This Court pointed out (p. 62) that "Whether such a case, as supposed, of shipment for commercial purposes, would be within the statute, would be primarily for the state court to determine, and it is not for us to say, as no such case is here presented." It seems apparent, therefore, that this Court did not interpret the Florida statute, but simply stated the construction of the Florida law by the Supreme Court of the State and held that, as so construed, the statute did not violate the Federal Constitution.

In any event, as we have shown, it is clear from both the language and history of Section 402 (a) (3) of the Federal Food, Drug, and Cosmetic Act that Congress intended to prevent the use of the channels of interstate commerce for the transportation of food which is filthy, putrid, or decomposed, without regard to whether it is unfit for food or harmful to health.

CONCLUSION

The decision below is correct, and no conflict of decisions is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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MARCH 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948